In the

UNITED STATES COURT OF APPEALS

For the NINTH CIRCUIT

UNITED STATES OF AMERICA, For the Use and Benefit of CHICAGO BRIDGE & IRON COMPANY, an Illinois corporation, Appellant. vs. ETS-HOKIN CORPORATION, a California corporation, and THE TRAVELERS INDEMNITY COMPANY, a Connecticut corporation, Appellees.	No. 21033

APPELLEES' BRIEF

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STATEMENT OF JURISDICTION

This Court lacks jurisdiction on this appeal because the notice of appeal was not timely filed within the period prescribed by Rule 73(a), Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Statement of Facts

Appellee Ets-Hokin Corporation (hereinafter "Ets-Hokin") is the prime contractor and the United States Bureau of Reclamation, Department of the Interior, is the owner under United States Government Contract No. 14-06-D-4429, dated June 25, 1962, which calls for Ets-Hokin to perform certain work in the completion of the powerhouse and switchyard at the Glen Canyon Dam, Page, Arizona. Appellee The Travelers Indemnity Company (hereinafter "Travelers") is Ets-Hokin's surety on the prime contract and has furnished the performance and payment bonds required by section 1 of the Miller Act, 40 U.S. Code, section 270a. Appellant Chicago Bridge & Iron Company (hereinafter "CB&I") entered into a written subcontract with Ets-Hokin on August 22, 1962, which called for CB&I to perform a portion of the work required under the prime contract. (Tr. pp. 11-14.)

During the performance of the prime contract and the subcontract a dispute arose between Ets-Hokin and CB&I as to whether CB&I was required to perform certain work, namely the prestressing of the turbine spiral cases, under the subcontract. CB&I denied that it was required to do this work

and refused to do the same. Ets-Hokin performed the work and to cover the cost of doing the work withheld from CB&I's progress payments the sum of $37,077.56.

On or about July 8, 1964, CB&I filed in the United States District Court for the District of Arizona, Prescott Division, action number Civ. 917 Pct. (Tr. pp. 1-5.) In this action, under section 2 of the Miller Act, 40 U.S. Code, section 270b, CB&I sought judgment from Ets-Hokin and Travelers on said Miller Act payment bond in the amount of said sum of $37,077.56. On August 14, 1964, Ets-Hokin demanded arbitration in accordance with Article 23 of the General Conditions of the subcontract. (Tr. pp. 15-17.) On or about August 20, 1964, Ets-Hokin and Travelers filed their Motion for Stay of Action Pending Arbitration (Tr. pp. 6-7.), supported by a Memorandum of Points and Authorities (Tr. pp. 8-10.) and the Affidavit of Robert S. Lauter. (Tr. pp. 18-19.) On or about August 27, 1964, CB&I filed its Response to that Motion for Stay Pending Arbitration. (Tr. pp. 20-26.)

On August 26, 1964, oral argument on the Motion for Stay Pending Arbitration was held before Judge Muecke of the District Court. At the oral argument counsel for appellees stipulated that Travelers would be bound by any award entered by the arbitrators. Judge Muecke granted the motion from the bench at the conclusion of the oral argument. (Tr. p. 27.) CB&I did not appeal from the stay order.

In accordance with the Court's order CB&I selected as

its arbitrator Mr. L. A. Elsener and appellees selected Mr. J. P. Murphy. Messrs. Elsener and Murphy selected as the third arbitrator Mr. T. J. Corwin, Jr. The arbitration took place in San Francisco, California, on July 6 and 7, 1965.

The arbitrators rendered their award on August 30, 1965. The award included an opinion and was signed by two of the three arbitrators--Mr. Corwin and Mr. Murphy. (Tr. pp. 54-57.) A dissent as to "some of the findings stated in the award" was signed by the CB&I arbitrator, Mr. Elsener. (Tr. p. 83.) The arbitrators held that Ets-Hokin was entitled to withhold from CB&I's earnings the sum of $16,850.45; of the total of $37,077.56 which had been sought by CB&I, the award directed payment by Ets-Hokin to CB&I of $20,227.11. Ets-Hokin stands ready to abide by this award and has offered to pay to CB&I the $20,227.11 awarded to CB&I by the arbitrators, but CB&I has refused this offer.

On or about November 24, 1965, CB&I filed its Motion to Vacate Stay Order and Alternate Motion to Vacate the Arbitration Award. (Tr. pp. 28-29.) On January 31, 1966, oral argument on said Motion and Alternate Motion was held before Judge Muecke of the Arizona District Court. Judge Muecke ruled from the bench following oral argument, denying both the Motion and the Alternate Motion. Judge Muecke stated that he was denying the Alternate Motion on the ground that he had no jurisdiction to vacate the award. (Appellant's opening brief, p. 6.) No opinion was written. A minute order, stating that

both motions were denied, was entered. (Tr. p. 69.) It is from that minute order, dated January 31, 1966, that this appeal has been taken by CB&I. CB&I filed its notice of appeal on March 25, 1966. (Tr. p. 180.)

In addition to the motions filed in the Arizona District Court, on or about November 29, 1965, CB&I filed in the United States District Court, Northern District of California, matter number 44430, entitled Application for Order to Set Aside Arbitration Award. On December 20, 1965, Ets-Hokin and Travelers filed their Reply and Memorandum in Opposition to that Application. On December 20, 1965, Ets-Hokin and Travelers also filed in the United States District Court, Northern District of California, matter number 44552, entitled Petition to Confirm Arbitration Award. Oral argument on both matters was held before Judge Zirpoli of that Court on March 30, 1966. (Appellant's opening brief, pp. 5-6.) On December 30, 1966, Judge Zirpoli issued his Order Confirming Award of Arbitrators and denying CB&I's Application for Order to Set Aside Arbitration Award. (See Appendix A, hereto.) Judgment on that Order was signed by Judge Zirpoli on January 11, 1967, and was entered of record on January 16, 1967. (See Appendix B, hereto.) On February 15, 1967, CB&I filed its notice of appeal from that Judgment. (See Appendix C, hereto.)

Questions Presented

1. Was CB&I's notice of appeal dated March 25, 1966

timely?

2. Was the District Court correct in refusing to vacate its stay order?

3. Did the District Court below have jurisdiction to hear CB&I's Alternate Motion to Vacate Arbitration Award?

SUMMARY OF ARGUMENT

1. CB&I's Notice Of Appeal Dated March 25, 1966, Was Not Timely Filed. Therefore, This Court Lacks Jurisdiction To Hear This Appeal.

2. An Agreement To Arbitrate Is Enforceable In Miller Act Cases.

3. The District Court Had No Jurisdiction To Hear The Alternate Motion To Vacate Award Under Section 10 Of The United States Arbitration Act.

4. The Numerous Assertions In CB&I's Opening Brief Concerning The Arbitration Proceeding And The References To The Transcript Of The Proceeding Constitute A Transparent Attempt By CB&I To Have This Court Review The Decision Of The Arbitrators On The Merits And To Persuade This Court To Substitute Its Judgment For That Of The Arbitrators. This Is Contrary To Law.

ARGUMENT

1. CB&I's Notice Of Appeal Dated March 25, 1966, Was Not Timely Filed. Therefore, This Court Lacks Jursidiction To Hear This Appeal.

Rule 73(a) of the Federal Rules of Civil Procedure

provides that, with certain exceptions, "An appeal permitted by law from a district court to a court of appeals shall be taken by filing a notice of appeal with the District Court within thirty days from the entry of judgment appealed from . . ." In this case, the judgment appealed from the Court's minute order entered January 31, 1966. Thirty days from that date expired on March 2, 1966. CB&I's notice of appeal was not filed in the Court below until March 25, 1966. Therefore, unless CB&I can bring itself within one of the exceptions to the thirty-day rule prescribed by Rule 73(a), its notice of appeal was not timely filed.

The only exception within which CB&I could attempt to bring itself is the one that provides that: "In any action in which the United States . . . is a party, the notice of appeal may be filed by any party within sixty days from such entry." While the action below was filed by CB&I in the name of the United States for the use and benefit of CB&I, the United States is not a true party. In Miller Act cases, the United States is only a nominal party to the action. For example, although the Miller Act states that suit must be brought in the name of the United States (40 U.S. Code, section 270b(b)), this is a mere formality which may be dispensed with. Blanchard v. Terry & Wright, Inc., 331 F.2d 467 (6th Cir. 1964); Hendry Corp. v. American Dredging Co., 318 F.2d 299 (5th Cir. 1963); Griners & Shaw, Inc. v. Federal Ins. Co., 234 F. Supp. 753 (E.D. S.C. 1964). The contractor-defendant is not allowed

to maintain a third-party complaint against the United States. United States ex rel. R. C. Hughes Elec. Co. v. Cook Elec. Co., 217 F. Supp. 647 (E.D. Wash. 1963). Nor can he counterclaim against the United States. United States ex rel. Mutual Metal Mfg. Co. v. Biggs, 46 F. Supp. 8 (E.D. Ill. 1942). And a Miller Act action abates on the death of the use-plaintiff if there is no timely substitution of a new party plaintiff. United States ex rel. Platten v. Bush Constr. Co., 109 F. Supp. 378 (E.D. Mich. 1953). None of these rules could apply if the United States were truly a party plaintiff.

Two Miller Act cases, wrongly decided as we shall demonstrate, are contrary to the weight of authority. These two are Barnard-Curtiss Co. v. United States ex rel. D. W. Falls Constr. Co., 252 F.2d 94 (10th Cir. 1958), followed by United States ex rel. Browne & Bryan Lumber Co. v. Mass. Bonding & Ins. Co., 29 F.R.D. 162 (E.D. N.Y. 1962). The Barnard-Curtiss case bases its holding entirely on United States Fid. & Guar. Co. v. United States ex rel. Kenyon, 204 U.S. 349 (1907).

The Kenyon case was not a Miller Act case. It dealt with the Heard Act. (40 U.S. Code, former section 270--the predecessor to the Miller Act.) There is an essential difference between a claimant's remedy under the Heard Act and his remedy under the Miller Act. The essential difference lies in the number of bonds and who is protected thereby. Under the Heard Act there was but a single bond given by the prime contractor to the United States to guarantee his performance to

the Government as well as his payment to his subcontractors. Obviously, the United States has a direct and real interest in the disposition of the proceeds of the bond.

However, under the Miller Act there are two bonds, one guaranteeing the contractor's performance to the Government (40 U.S. Code, section 270a(a)(1)), and one guaranteeing the contractor's payment of his subcontractors and materialmen (40 U.S. Code, section 270a(a)(2)). The United States has a direct and real interest in the first bond. Its interest in the second bond is only nominal. It is named on the second bond essentially only because the second bond is required before and as a condition precedent to the execution of the prime contract with the Government. This may be before there are any subcontractors or materialmen. Accordingly, the United States is the obligee on the bond, for the "use and benefit" of any subcontractors or materialmen on the job.

The court in Barnard-Curtiss failed to perceive this essential difference between the Heard Act and the Miller Act. It also disregarded a holding in a Supreme Court case decided subsequent to Kenyon. This later Supreme Court case is Equitable Sur. Co. v. United States ex rel. W. McMillan & Son, 234 U.S. 448, 456 (1914). There the Supreme Court held that with respect to the claim of a subcontractor on a Heard Act bond, the United States was a mere trustee for the benefit of laborers or material men under the Heard Act bond--that is, a nominal party.

As noted above, the Browne & Bryan case relies entirely

on Barnard-Curtiss. This Court should follow the weight of authority. The Browne & Bryan and Barnard-Curtiss cases should be disregarded for the reasons stated above.

Since the United States is not a true party in this action, the exception allowing sixty days rather than thirty days to file a notice of appeal is not applicable. The notice of appeal herein was filed untimely. Timely filing of a notice of appeal is jurisdictional. Lobato v. Pay Less Drug Stores, Inc., 261 F.2d 406, 408 (10th Cir. 1958); Barta v. Oglala Sioux Tribe of Pineridge Reservation, 259 F.2d 553 (8th Cir. 1958). Therefore, this Court is without jurisdiction to hear this appeal. The appeal should be dismissed.

2. An Agreement To Arbitrate Is Enforceable In Miller Act Cases.

The same issue controls both the original motion pursuant to which the stay was granted and the motion to vacate the stay from which this appeal is taken; namely, are agreements to arbitrate future disputes enforceable against Miller Act claimants? CB&I continually confuses that issue with the question of whether particular disputes between the parties to an arbitratic agreement are referable to arbitration under that agreement.*/

*/ If a dispute is referable to arbitration under an agreement, and the other requirements of section 3 of the United States Arbitration Act (9 U.S. Code, section 3) are met, a United State District Court must grant a motion to stay an action brought therein pending arbitration of that dispute.

The enforceability of arbitration agreements has been upheld in many Miller Act cases: United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705 (2nd Cir. 1966); Ets-Hokin & Galvan, Inc. v. United States ex rel. Albert S. Pratt, Inc., 350 F.2d 871 (9th Cir. 1965); Electronic & Missile Facilities, Inc. v. United States ex rel. Moseley, 306 F.2d 554 (5th Cir. 1962), rev'd on other grounds sub nom. Moseley v. Electronic & Missile Facilities, Inc., 374 U.S. 167 (1963); United States ex rel. Air-Con., Inc. v. Al-Con Dev. Corp., 271 F.2d 904 (4th Cir. 1959); United States ex rel. Frank A. Trucco & Sons Co. v. Bregman Constr. Corp., 256 F.2d 851 (7th Cir. 1958); Agostini Bros. Bldg. Corp. v. United States ex rel. Virginia - Carolina Elec. Works, Inc., 142 F.2d 854 (4th Cir. 1944); United States ex rel. Industrial Eng'r & Fabricators, Inc. v. Eric Elevator Corp., 214 F. Supp. 947 (D. Mass. 1963); United States ex rel. Seaboard Sur. Co. v. Electronic & Missile Facilities, Inc., 206 F. Supp. 790 (D.P.R. 1962). See also Wilko v. Swan, 346 U.S. 427, 431-32 (text at note 13) (1953).

In the case of United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., supra, the question of the alleged inconsistency between a Miller Act claimant's right to sue and a defendant's right to enforce an arbitration agreement was put directly to the Court of Appeals for the Second Circuit. The Court, after extensive discussion of the above authorities, held:

"For all of the above reasons we hold the Miller Act contains nothing that in any way prevents the appellees from compelling appellant to arbitrate the dispute between them as he previously had agreed to do." (364 F.2d,at 708.)

In Ets-Hokin & Galvan, Inc. v. United States ex rel. Albert S. Pratt, Inc., supra, the question of the enforceability of arbitration agreements in Miller Act cases was put directly to this Court.*/ This Court vacated the lower Court's order denying a stay, sought under section 3 of the United States Arbitration Act (9 U.S. Code, section 3), and remanded the matter to the District Court for determination of whether Ets-Hokin had waived its right to arbitrate under the agreement, impliedly holding that if Ets-Hokin had not waived its right to arbitrate, a stay should be granted and arbitration should proceed. Thus this Court has in effect, if not in words, determined that arbitration is an appropriate tribunal for determining Miller Act disputes and is thus not inconsistent with the purpose of and remedy provided by the Miller Act.

In Electronic & Missile Facilities, Inc. v. United

*/ The attorneys for Ets-Hokin in the Pratt case are the attorneys for appellees herein. An examination of pages 6 through 9 of Appellant's Reply Brief in the Pratt case (Tr. p. 179) makes it amply clear that the issue was briefed and argued by both parties.

States ex rel. Moseley, supra, Chief Judge Tuttle's majority opinion convincingly and correctly analyzes the language and the legislative history of the Miller Act and concludes that nothing therein "indicates that Congress meant to prohibit a laborer or materialman from voluntarily substituting the procedure of arbitration for his right to litigate in a federal court. On the other hand, the United States Arbitration Act expressly and unequivocally gave the parties the right to provide for arbitration of all disputes arising under their contracts." (306 F.2d, at 556.) Further, he found that arbitration is not inherently prejudicial to Miller Act claimants and that enforcement of arbitration agreements in such cases is not against public policy.

As indicated by the citation, the Moseley case was reversed on other grounds by the United States Supreme Court. The opinion of the Court, signed by six justices, casts no doubt whatever on the reasoning of Chief Judge Tuttle regarding the question of a possible conflict between the Miller Act and the United States Arbitration Act. CB&I, on pages 21-22 of its opening brief, apparently contends that the concurring opinion of the Chief Justice and Mr. Justice Black constitutes a substantial basis for its argument that arbitration is not available to settle disputes under the Miller Act. While the concurring opinion did state the questions quoted by CB&I on pages 21-22 of its brief, it is significant that six members of the Court who agreed with the Court's disposition of the case

did not sign the Chief Justice's concurring opinion. And Mr. Justice Stewart, in a dissenting opinion, specifically approved Chief Judge Tuttle's opinion. 374 U.S., at 172.

United States ex rel. Seaboard Sur. Co. v. Electronic & Missile Facilities, Inc., supra, also directly holds that an arbitration agreement is enforceable against a Miller Act claimant under the United States Arbitration Act. The other cases cited above, while not directly stating that arbitration agreements are enforceable against Miller Act claimants, certainly imply that that is the case, for if a court believed that the Miller Act gave protected claimants an unwaivable right to litigate, it would not concern itself over whether the judicial requirements of the United States Arbitration Act had been met (Agostini) or the Virginia law of arbitration had been met (Air-Con), or whether the movent had waived his right to arbitrate (Trucco and Pratt). The Supreme Court would certainly not have cited Agostini, a Miller Act case, as an example of the type of case in which arbitration could be particularly useful (Wilko) if it believed that arbitration was inconsistent with the rights of a subcontractor under the Miller Act.

As we have demonstrated,the law clearly upholds the right to enforce an arbitration agreement against a Miller Act claimant.

Since the law on the issue is clear it is a fruitless exercise to inquire, as CB&I does on pages 25-28 of its brief, whether arbitration is against public policy in cases involving

attorneys' fees under the Federal Emergency Price Control Act, a stockholder's derivative action, a proceeding to dissolve a closed corporation, custody of children, or distribution of a decedent's estate.

It also is fruitless to argue, as CB&I does on pages 10-13 of its brief, the question of whether technical or legal issues should be turned over to arbitrators for decision. Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956), cited by CB&I at page 12 of its brief, makes it clear that such questions can be and are decided by arbitrators under appropriate arbitration agreements. The passage of the United States Arbitration Act in 1925 put an end to the relevance of academic discussions of whether this question or that was appropriate for submission to the process of arbitration. The test substituted by the Arbitration Act was whether the issue was referable to arbitration under an agreement between the parties. (In passing we suggest to the Court that CB&I's complaint on page 11 of its brief that the issues in this case required the application of legal rather than engineering expertise should not be taken seriously. CB&I had 100% freedom in choosing its arbitrator--and chose a construction man rather than a lawyer.)

3. The District Court Had No Jurisdiction To Hear The Alternate Motion To Vacate Award Under Section 10 Of The United States Arbitration Act.

CB&I based its Alternate Motion to Vacate Arbitration

Award on section 10 of the United States Arbitration Act, 9 U.S. Code, section 10. (Tr. p. 51, line 8.) Yet that section specifically states that it is the United States Court in and for the District wherein the award was made that may make an order vacating the award upon the application of any party to the arbitration. Since the arbitration was held and the award was made in San Francisco, California it is clear that the only Court that has jurisdiction to vacate this award under section 10 of the United States Arbitration Act is the United States District Court for the Northern District of California. CB&I has recognized the jurisdiction of that Court by bringing its Application for Order of the Court to Set Aside Arbitration Award. (See pp. 5-6 of Appellant's brief.)

CB&I attempts to avoid the exclusive jurisdiction provision of section 10 of the United States Arbitration Act by arguing that this provision of section 10 is permissive, not exclusive. CB&I cites no cases for this proposition but relies on the use of the word "may" in the section, instead of the word "shall". CB&I would have the Court hold that section 10 in effect reads:

> "In either of the following cases the United States court in and for the district wherein the award was made or in and for any other district which has jurisdiction over the parties may make an order vacating the award . . . "

The added underlined portion would constitute a major and patent deviation from Congress's clear intent to grant jurisdiction, to review the award of a board of arbitrators, only to the court in the district where the arbitration was held. If that intent is to be changed, this Court should leave the change to the Congress. The District Court's denial of its jurisdiction to vacate the award should be affirmed.

4. The Numerous Assertions In CB&I's Opening Brief Concerning The Arbitration Proceeding And The References To The Transcript Of The Proceeding Constitute A Transparent Attempt By CB&I To Have This Court Review The Decision Of The Arbitrators On The Merits And To Persuade This Court To Substitute Its Judgment For That Of The Arbitrators. This Is Contrary To Law.

CB&I has designated as part of the record the transcript of the arbitration proceeding and has made repeated references in its brief as to what went on at that proceeding.

What transpired at the arbitration proceeding is entirely irrelevant to any question properly before this Court. We know that this Court will treat it as such.

It cannot be relevant to CB&I's Motion to Vacate the Stay because CB&I's claim of unfairness in the arbitration proceeding cannot be utilized to support a claim of inherent unfairness. As demonstrated above the courts have already determined that issue. Arbitration is not inherently unfair

to a Miller Act claimant.

If CB&I had an objection to the arbitration its proper remedy was a motion to vacate or modify the award. CB&I in fact knew that this was the proper remedy because it made such a motion to the California District Court, which motion was denied. However, what transpired at the arbitration proceeding cannot be relevant to CB&I's Alternate Motion to Vacate or Modify the Award in the Arizona District Court, or we respectfully suggest even considered, because that Court did not have jurisdiction to hear the motion.

But even in considering a motion to vacate or modify in a proper Court, the law is clear that the relevance of what transpired at the arbitration proceeding is limited. The District Court could not reverse the decision of the arbitrators on the merits or substitute its judgment for that of the arbitrators. See San Martine Compania de Navegacion, S.A. v. Saguenay Terminals, Ltd., 293 F.2d 796 (9th Cir. 1961). Neither should this Court substitute its judgment for that of the arbitrators.

CONCLUSION

1. The United States is not a true party in the Miller Act lawsuit below. Therefore CB&I's notice of appeal filed more than thirty days after entry of the order appealed from was untimely and this Court lacks jurisdiction to hear this appeal.

2. It would have been manifestly unfair for the

District Court to vacate its October, 1964 Stay Order and to require appellees to litigate this matter after having arbitrated it in reliance on that Stay Order. The unfairness arises from the large extra expense to appellees and from the fact that to vacate the Stay after the arbitration would be giving CB&I an extra procedural advantage to which it is not entitled.

3. Appellees' right to arbitrate their dispute with CB&I is enforceable under the United States Arbitration Act and is not diminished by the fact that CB&I has brought suit under the Miller Act. The order denying the Motion to Vacate the Stay Order should be affirmed.

4. The Arizona District Court had no jurisdiction to vacate the award of the arbitrators under the United States Arbitration Act.

5. What went on at the arbitration proceeding was irrelevant to any matter properly before the District Court, and is irrelevant on this appeal. This Court should refuse CB&I's invitation to reverse the decision of the arbitrators and substitute its own decision therefor.

6. The rulings of the Arizona District Court should be affirmed.

Respectfully submitted,

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Attorneys for Appellees

By Laurence N. Walker
Laurence N. Walker

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United State Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

Laurence N. Walker

Laurence N. Walker

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, For the use and benefit of CHICAGO BRIDGE & IRON COMPANY, an Illinois corporation, Applicant, vs. ETS-HOKIN CORPORATION, a California corporation, and THE TRAVELERS INDEMNITY COMPANY, a Connecticut corporation, Respondents.	No. 44430
In the Matter of the arbitration between ETS-HOKIN CORPORATION, a California corporation, and THE TRAVELERS INDEMNITY COMPANY, a Connecticut corporation, Petitioners, and CHICAGO BRIDGE AND IRON COMPANY, an Illinois corporation, Respondent.	No. 44552

ORDER CONFIRMING AWARD OF ARBITRATORS

The Court has before it the application of CHICAGO BRIDGE & IRON COMPANY for an order setting aside an arbitration award (Civil No. 44430) and the petition of ETS-HOKIN CORPORATION to confirm the same award (Civil No. 44552), which have been consolidated and submitted on the record now before the Court.

The jurisdiction of this Court arises under the provisions of Sections 1, 7, 10 and 11 of Title 9 U.S.C., and alternatively, under the provisions of Section 1332 of Title 28 U.S.C., in that all parties hereto are of diverse citizenship and the amount in controversy exceeds $10,000.

Since CHICAGO BRIDGE & IRON COMPANY must carry the burden in seeking to set aside the arbitration award, it will hereinafter be referred to as "plaintiff", and ETS-HOKIN CORPORATION will be referred to as "defendant". See American Almond Products Co. v. Consolidated Pecan Sales Co., 144 F. 2d. 448, 450 (2 Cir. 1944). The TRAVELERS INDEMNITY COMPANY, the other party to these proceedings, had agreed prior to the arbitration to be bound by any award made by the arbitrators.

Defendant entered into a contract with the United States to perform certain construction work at Glen Canyon Dam in Arizona. Defendant subcontracted part of this obligation to plaintiff. During the course of the contract a dispute arose as to the obligation of plaintiff to prestress certain spiral cases in the installation of turbine units. Plaintiff refused to perform the prestressing, and the defendant deducted the cost of this work from its payment obligations under the subcontract. Plaintiff thereafter filed a Miller Act (40 U.S.C., Section 270a-d) lawsuit in the United States District Court for the District of Arizona. On defendant's motion this action was stayed pending arbitration. The order staying this action provides as follows:

> It is ordered that defendant's motion for stay of action pending arbitration is granted, only as to specific items raised on the motion, subject to either party coming back to this Court for relief by reason of any delay in such arbitration.

The parties submitted their grievances to arbitration before a Board, which met in San Francisco. The Board consisted of three engineers: Mr. J. P. Murphy, selected by

defendant; Mr. L. A. Elsener, selected by plaintiff; and Mr. J. T. Corwin, Jr., selected by the first two named. After hearing held on July 6 and 7, 1965, the Board, on August 30, 1965, in a written memorandum signed by two of its members, Murphy and Corwin, Jr., found "that Chicago Bridge & Iron Company should have performed the prestressing of the spiral case" and entered an award directing that defendant pay to plaintiff the sum of $20,727.11. The total amount sought by plaintiff was $37,077.56. A written dissent as to "some of the findings stated in the award" was signed and entered by the third arbitrator, Elsener.

Plaintiff seeks to set aside the award and contends that in making the award the arbitrators exceeded their "authority" (Section 10 of Title 9 U.S.C. uses the word "powers") by going beyond the issues submitted to them. Plaintiff further contends that "the arbitrators have improperly computed the award based upon available evidence before them." Plaintiff relies on Section 11 of Title 9 U.S.C. for a modification of the award or a remand for such purpose.

The pertinent provisions of Section 10 of Title 9 U.S.C. read:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
>
> . . . .
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. [Emphasis added]

Section 11 of Title 9 U.S.C. in its pertinent provisions reads:

> In either of the following cases the United States court . . . may make an order modifying or

correcting the award upon application of any party to the arbitration--

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award.

. . . .

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Whether the arbitrators exceeded their "powers" depends upon the issues which were submitted to them for decision. Normally, the issues submitted for arbitration are clearly defined in a formal agreement between the parties. Unfortunately, in this case no such formal agreement is included in the record. The record, which the Court must examine to determine the issues presented for decision of the arbitrators, consists of:

(a) The subcontract between the plaintiff and defendant and, in particular, the provisions of paragraphs I, under the title "Work to be Performed" 1/ and 23, under the title "Arbitration";2/

(b) The letter from plaintiff to defendant dated August 15, 1962, setting forth plaintiff's understanding of the terms of the contract to be incorporated in (a) above;

1/ The subcontract under paragraph I. WORK TO BE PERFORMED recites in part: "Subcontractor agrees to furnish all labor, to furnish, supply and install all equipment, materials and supplies, . . ., as more specifically set forth in Section 16 of the General Conditions of this Subcontract, and to do any and all things required to perform all that portion of the work provided for in the General Contract which is described as follows: . . . (b) A portion of Item 79 of Bidding Schedule for Spec. No. DC-5750 described as the installation, assembly and welding of the upper and lower draft tube liners with pier noses and pit liners as well as the installation of the discharge ring, stay ring and spiral cases with test barrel and spider. The above described work shall include but not necessarily be limited to the following as per Spec. No. DC-5750." Then follows a list of the included items and a list of items that the Contractor shall furnish to the Subcontractor, followed by a further proviso that "It is understood that this

(c) The formal demand of defendant for arbitration dated August 14, 1964, submitted at the time it moved to stay the proceedings in the Miller Act case in Arizona;

(d) The order of the District Court in Arizona staying the Miller Act proceedings;

(e) Answers to questions propounded by the neutral arbitrator, Corwin, Jr.;

(f) Supplementary statements of issues and contentions (argumentative in character) filed by each party with the arbitrators;

(g) Written briefs filed with the arbitrators both before and after the arbitration proceedings;

(h) The memorandum and award made and entered by the majority of the arbitrators;

(i) The written dissent of arbitrator Elsener; and

(j) The transcript of the proceedings before the Arbitration Board.

Plaintiff takes the position that the arbitrators were not empowered to look beyond the four corners of the subcontract, (a) above, and the demand of defendant, (c) above, which demand plaintiff contends formed the basis of the stay order of the District Court in Arizona.

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contract does not include work described as follows:". The excluded work is then described. Nowhere in the subcontract, either in the included or excluded work, is there any specific reference to prestressing spiral cases.

2/ Paragraph 23 under the General Conditions of the Subcontract provides: "Arbitration: In case of any dispute between the parties as to the interpretation of this agreement, . . . or with respect to any other matter arising out of or in connection with this Subcontract or its performance, either party may demand that the dispute be submitted to arbitration. . . ."

Before considering the merit of plaintiff's position, it should be noted that the arbitrators' authority was not limited by the order of the Arizona District Court. The remedy sought by the defendant in the Arizona District Court was merely the staying of the Miller Act lawsuit under Section 3 of Title 9 U.S.C. The Court's order did not direct the parties to arbitrate. It merely stayed the lawsuit pending arbitration in accordance with the agreement of the parties. Thus, the arbitrators derived their authority not from the order of the Court, but from the arbitration agreement, Article 23 of the General Conditions of the Subcontract, as specified by the demand for arbitration and the later statements and briefs of the parties defining the issues for arbitration. American Almond Products Co. v. Consolidated Pecan Sales Co., supra.

On the merits, this Court is of the view that the Board was not limited in its powers to the subcontract and the first demand of defendant for arbitration made on August 14, 1964. The items of record listed above as (d) through (j) show that the parties did not limit the issues to the subcontract and the demand of August 14, 1964, and, furthermore, that the Board felt it was necessary to resort to extrinsic evidence to clear up an ambiguity which arose in its effort to determine what work was intended and understood by the parties to be the work described in the subcontract as "a portion of Item 79 of Bidding Schedule for Spec. No. DC-5750 described as the installation, assembly and welding of the upper and lower draft tube liners with pier noses and pit liners as well as the installation of the discharge ring, stay ring and spiral cases with cast barrel and spider."

The demand of August 14, 1964 was broadened by the parties in their preliminary statements of the issues which

were submitted to the arbitrators prior to the hearing.

Defendant states the issues in part as: "(a) Whether by intention and understanding of the parties or express contract language or both, the prestressing of the spiral cases was part of Chicago Bridge & Iron's subcontract." [Emphasis added].

Plaintiff states the issues in part as: "The subcontract was clearly intended and understood by the parties to be the work under item 79 which was preliminary to CB & I subcontract work for the turbine manufacturer . . . ." [Emphasis added].

In the course of the hearing counsel for plaintiff clearly stated the broadened issue as follows: "MR. BROPHY: I think what is before the Board is what the parties did after the agreement, and what they did before the agreement, for the purpose of the Board's making up its mind what the agreement meant at the time that it was executed (p. 93, Transcript of Arbitration Proceedings).

Thus, both plaintiff and defendant included and understood to be included among the issues to be discussed and determined by the arbitrators the intention and understanding of the parties, which clearly goes beyond the question of the inclusion or not of a specific written covenant in the subcontract. While the memorandum opinion and award of the majority of the Board may not be a model for clarity, findings 8 and 11 [3/] of the majority opinion can be fairly construed

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3/ Findings 8 and 11 of the majority opinion of the Board provide:

> 8. That the oral offering of furnishing a stand-by operator by a responsible representative of Chicago Bridge and Iron Company to secure a contract should be as binding as the written word, as no evidence was presented of a written acceptance or refusal of this offer.

to hold that the parties intended and understood that plaintiff agreed to and was to do the prestressing work and finding 12 [4] can be fairly construed to state that the work of prestressing was not an express written covenant of the contract. This understanding of findings 8, 11 and 12 is confirmed in the penultimate paragraph of arbitrator Elsener's dissent, wherein he states:

> Even if Chicago Bridge should be backcharged, the finding that overtime should be included is incorrect. Either Chicago Bridge agreed to do the prestressing work or it did not. The majority of this Board says it did. The terms of the contract between Chicago Bridge and Ets-Hokin specifically excluded any responsibility of Chicago Bridge for premium pay for work Chicago Bridge agreed to do. [Emphasis added].

A further indication of the broadened scope of the issues presented to the Board and understood by the members of the Board to be within their province in the list of twenty-one questions submitted by arbitrator Corwin, Jr., to the parties relating to the subcontract, the performance of the work and the negotiations between the parties. Question No. 19(a) asked, "Was there any discussion between contractor and subcontractor about who would perform the prestressing work?". Both parties answered this question. Plaintiff raised no objection to the question as being beyond the scope of the submission, as plaintiff now contends.

> 11. That Chicago Bridge and Iron Company should have performed the prestressing of the spiral case and the Ets-Hokin Corporation should have performed the cooling of the concrete surrounding the spiral case.

4/ Finding 12 of the majority opinion of the Board provides:

> 12. That the Chicago Bridge and Iron Company's claim that if responsible, they should not be charged overtime rates, this must be denied as Exhibit 83, pp. C-9, covers work which Chicago Bridge and Iron Company agrees to perform, etc. Evidence indicates they did not agree to perform the prestressing work.

This Court finds that though there is no specific mention in the subcontract of an obligation on the part of plaintiff to do the prestressing work, the arbitrators in the determination of this issue were not limited to the four corners of the subcontract, but were empowered by reason of the supplementation and broadening of the issues presented to them to resort to extrinsic evidence to determine whether the parties intended and understood that plaintiff would do the prestressing work. The award was within the terms of the submission and regardless of the degree to which the views of the arbitrators on the facts and the law may be open to question, such award "will not be set aside by a court for errors either in law or fact." See San Martine Companie De Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F. 2d 796, 800-802 (9th Cir. 1961).

Plaintiff has not sustained its burden, and there is no basis for the Court to determine that the award was beyond the submission or that the award contains anything but the honest decision of the arbitrators after a full and fair hearing of the parties. This Court will not substitute its judgment for that of the arbitrators.

The Court further adds that even if it be conceded that a comparison of paragraphs 8, 11 and 12 of the majority opinion accompanying the award leads one to conclude that the award was ambiguous, this is not a ground for the Court to set aside the award. United Steel Workers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 598 (1960).

The foregoing findings and conclusions have been based entirely on federal law. If the Court should treat the application herein as one to vacate or correct the award under California law, it must come to the same conclusion reached above. California law is the same as federal law insofar as

grounds for vacating or correcting the award are concerned. California Code of Civil Procedure, Section 1286.2. The decision of the arbitrators is final both as to questions of fact and of law. Sapp v. Barenfeld, 34 Cal. 2d 515 (1949). Every intendment of validity must be given the award. Griffith Co. v. San Diego College for Women, 45 Cal. 2d 501, 516 (1955).

The record will not sustain plaintiff's second contention that the arbitrators improperly computed the award. While there may have been "available evidence before them" from which a correction of a claimed miscalculation of back-charges could have been made to plaintiff's benefit in the sum of $2,662.08 or $1,305.93 or some other sum, the fact remains that this available proof was never submitted to the arbitrators in any verified form. Although there was discussion at the hearing relative to the reconciling of any claimed differences, this was not done. See page 289 of the Transcript of the Arbitration Proceedings. Under the circumstances, the award must be accepted as final, and this Court will not speculate as to what corrections, if any, might have been made.

The application to set aside the award and to substitute a different award in its place is denied. The petition to confirm the award is granted.

This opinion shall constitute the findings of fact and conclusions of law of the Court, and based thereon defendant is directed to submit an appropriate judgment to the Court.

Dated: December 30, 1966

ALFONSO J. ZIRPOLI
United States District Judge

United States District Court

Northern District of California

Division

U.S.A. FOR THE USE & BENEFIT OF CHICAGO BRIDGE & IRON CO. ETC
VS
ETS-HOKIN CORP. ET AL

AND

vs.

IN THE MATTER OF THE ARBITRATION BETWEEN ETS-HOKIN CORP. ET AL
VS
CHICAGO BRIDGE & IRON CO. ETC

Civ. Nos. 44430 & 44552

NOTICE

TO PILLSBURY, MADISON & SUTRO
STANDARD OIL BLDG. SAN FRANCISCO, CALIF.

RYLEY, CARLOCK & RALSTON
TITLE & TRUST BLDG. PHOENIX, ARIZONA

FELDMAN, WALDMAN & KLINE
2700 RUSS BLDG. SAN FRANCISCO, CALIF.

YOU ARE HEREBY NOTIFIED that on JANUARY 16, 1967

a DECREE JUDGMENT was entered of record in this office in the above entitled case.

UPON THE ORDER CONFIRMING AWARD OF ARBITATORS

~~YOU ARE HEREBY NOTIFIED that~~ ~~a NOTICE OF APPEAL was filed~~ in the above entitled case, A copy which is enclosed herewith.

JAMES P. WELSH
CLERK, U. S. DISTRICT COURT

D.T.C.

SAN FRANCISCO, CALIFORNIA

JANUARY 16, 19 67

FELLMAN, WALDMAN & KLINE
2700 Russ Building
San Francisco, California 94104
Telephone: 981-1300

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, For the use and benefit of CHICAGO BRIDGE & IRON COMPANY, an Illinois corporation, Applicant, vs. ETS-HOKIN CORPORATION, a California corporation, and THE TRAVELERS INDEMNITY COMPANY, a Connecticut corporation, Respondents.	NO. 44430
In the matter of the arbitration between ETS-HOKIN CORPORATION, a California corporation and THE TRAVELERS INDEMNITY COMPANY, a Connecticut corporation, Petitioners, and CHICAGO BRIDGE AND IRON COMPANY, an Illinois corporation, Respondent.	NO. 44552

JUDGMENT UPON ORDER CONFIRMING AWARD OF ARBITRATORS

These consolidated proceedings came on regularly for hearing on March 30, 1966, in the above-entitled Court, the Honorable Alfonso J. Zirpoli, Judge, presiding, applicant and respondent Chicago Bridge & Iron Company appearing by attorneys

Frank [illegible]. Brophy, Jr., and G. H. Eckhardt and respondents and petitioners Ets-Hokin Corporation and The Travelers Indemnity Company appearing by attorneys Leo E. Borregard and Laurence [illegible]. Walker; and written memoranda having been presented by all parties; and the cause having been argued and submitted for decision; and the Court having made and caused to be filed herein its written findings of fact and conclusions of law; and the Court having ordered on December 30, 1966, that the Petition of Ets-Hokin Corporation and The Travelers Indemnity Company to confirm an arbitration award dated August 30, 1965, in favor of Chicago Bridge & Iron Company and against Ets-Hokin Corporation in the sum of $20,227.11, be granted, and that the application of Chicago Bridge & Iron Company to set aside said award and to substitute in its place an award in its favor in the amount of $37,077.56, plus interest, be denied, and a judgment be entered thereon; and the aforesaid arbitration award having been duly filed herein;

It is ORDERED, ADJUDGED, AND DECREED that:

1. Chicago Bridge & Iron Company recover of and from Ets-Hokin Corporation and The Travelers Indemnity Company the sum of $20,227.11, and

2. Ets-Hokin Corporation and The Travelers Indemnity Company recover from Chicago Bridge & Iron Company their costs in these consolidated proceedings.

Dated: January [illegible], [illegible].

ALPHONSO J. ZIRPOLI
United States District Judge

Approved as to form.
RYLEY, CARLOCK & RALSTON

By [signature]

Dated: Jan 9, 1967

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

ORIGINAL

FILED

FEB 1 0 1967

CLERK, U. S. DIST. COURT
SAN FRANCISCO

UNITED STATES OF AMERICA, For the use and benefit of CHICAGO BRIDGE & IRON COMPANY, an Illinois corporation, Applicant, vs. ETS-HOKIN CORPORATION, a California corporation, and THE TRAVELERS INDEMNITY COMPANY, a Connecticut corporation, Respondents.	NO. 44430
In the matter of the arbitration between ETS-HOKIN CORPORATION, a California corporation and THE TRAVELERS INDEMNITY COMPANY, a Connecticut corporation, Petitioners, and CHICAGO BRIDGE AND IRON COMPANY, an Illinois corporation, Respondent.	NO. 44552

NOTICE OF APPEAL

Notice is hereby given that the CHICAGO BRIDGE AND IRON COMPANY, Respondent above-named, hereby appeals to the U. S. Court of Appeals for the Ninth Circuit from the Judgment of the District Court entered upon the Order of said Court in this action on the 16th day of January, 1967 denying the application of CHICAGO BRIDGE AND IRON COMPANY to set aside an Arbitration Award of August 30, 1965 and granting the Petition of the ETS-HOKIN CORPORATION and THE TRAVELERS INDEMNITY COMPANY for an Order confirming an Arbitration Award dated August 30, 1965.

DATED: This 10th day of February, 1967.

[redacted]

RYLEY, CARLOCK & RALSTON

by /s/ Frank C. Brophy, Jr.

Attorneys for Respondent
Chicago Bridge & Iron Company

Copy of the foregoing Notice
mailed this 15th day of February,
1967 to:

Feldman, Waldman & Kline
2700 Russ Building
San Francisco, California 94104

/s/ Frank C. Brophy, Jr.